UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FORKLIFT & EQUIPMENT SERVICES, INC.

and Case 18–CA–15578

JAMES BREITER, An Individual

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DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: I heard this case in Minneapolis, Minnesota, on August 15, 2000.[1] On June 30 the Acting Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing, based upon an unfair labor practice charge filed on April 6, alleging violation of Section 8(a)(1) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs which have been filed, and upon my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE ALLEGED UNFAIR LABOR PRACTICES

This case presents, in the final analysis, the single issue of motivation for a discharge on March 29 of one employee: mechanic James Breiter. At all material times Respondent, Forklift & Equipment Services, Inc., has been a Minnesota corporation with principal office and place of business located in Savage Minnesota, where it engages in the repair and resale of unit

[1] Unless stated otherwise, all dates occurred during 2000.

industrial equipment.[2] In general, Respondent repairs and resells anything mechanical. But the focus of its operations is material handling equipment. That is, it purchases used equipment and either attempts to refurbish and resell it or, alternatively, scraps equipment that cannot be refurbished.

Among the used material handling equipment that Respondent obtains are pallet jacks, skid loaders or Bobcats, and forklifts. As its name suggests, forklift repair and resale is Respondent's "big thing," as put by owner James Seurer, an admitted statutory supervisor and agent of Respondent at all material times. Within the category of forklifts, Seurer testified that repair and resale of forklifts that are electric is "not a major part [of Respondent's business] but it's a big part." As will be seen, that is a fact that becomes of importance in evaluating the motivation issue presented for resolution. Also important is the fact that Respondent is a small business, both in size of its facility and in historic employee complement.

As to the former, Respondent's Savage office and place of business totals 6,400 square feet. 3,200 square feet are occupied by the shop, with the other 3,200 square feet occupied by an office, showroom and parts area. Thus, for people working there, according to Seurer, there is a "fair amount" of contact and interaction among them.

With respect to those people, Seurer testified that he had been sole owner of Respondent for "[a]bout 22 years." "I do everything from scrub the floor to drive … the truck," testified Seurer. His wife, Donna, performs "the office books, et cetera," Seurer testified. A third member of the family, their 32-year-old son Jay, has worked for Respondent since its inception, more steadily from high school through a "couple years" of college and thereafter. Seurer testified that Jay Seurer works "basically in sales," but also "has worked beside me" as a mechanic when "he drives a little. He repairs and whatever. He -- just a handyman such as I do," performing "detailing or cleaning up vehicles," as well as sanding and painting refurbished forklifts.

So far as the record reveals, for over a decade Seurer, his wife and son had been the only workers at Respondent's Savage facility. During the early 1990s—"seven, eight, ten years" ago, estimated Seurer—Respondent hired Herb Rhorda. "Herb is my right--my number one guy in the shop or my number two man," testified Seurer. There is no evidence that Respondent hired anyone else until the latter part of 1995 when Breiter was hired on a part-time basis. He then was "hauling boat trailers for a company in St. Paul," Breiter testified. When hired, Breiter was not a stranger to Seurer. The latter testified, without dispute, that "we go back 10,000 years, okay, or a long time. We hung around the same places together. That is as far as restaurants or whatever. We got along good there." As will be seen, the latter turned out to be less true in connection with Breiter's relationships with others.

While working part-time for Respondent, Breiter testified, "I started out driving truck for Jim, pick up and delivery of equipment, forklifts and what have you"—work, of course, similar to what he had been performing for the St. Paul company. Apparently Breiter lost his job at that boat-trailer hauling company during mid-1996. For, he testified that "I believe I went full time in

[2] Respondent admits that at all material times it has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, based upon its admissions of the allegations that, in the course of conducting its business operations during its fiscal year June 1, 1999 through May 31, 200, it purchased goods valued in excess of $50,000 which it received at its Savage facility from firms located in Minnesota which, in turn, had received those goods directly from outside of the State of Minnesota.

the middle toward fall of ’96.” And Seurer testified, “I knew Jim was out of a job. I brought him in."

Asked if he had mechanical ability, Breiter answered, “Oh, yes, I do,” and further testified, somewhat vaguely, “I’ve been there pulling wrenches for forty years.” However, “there” obviously did not mean at Respondent. As mentioned above, he had started working for it as a part-time driver. At some point, either as his part-time job progressed or after having become Respondent’s full-time employee, Breiter testified that “I got into the mechanical end of it. Got interested in the hydraulics end of it and I learned a lot from Herb [Rhorda].” Indeed, regardless of how long he had been “pulling wrenches,” it seems that a fair amount of his mechanical work at Respondent had been based upon what Breiter was learning from Rhorda. Thus, Breiter testified, “I can do tuneups. I can do brake work. I could do--Herb taught me how to do the lift cylinders. If they were leaking oil they’d have to be resealed. He taught me how to do them. I was able to do them on my own. I’ve pulled engines out of fork lifts, put them back in. I’ve--with help we’d just get it done.” By the time of his discharge on March 29, estimated Breiter, his work had been “80 percent mechanical, 20 percent driving.”

On December 4, 1999 Respondent hired a third non-family employee: Alfred Janousek. Before then, Janousek testified, “I was a maintenance manager for Waste Management, Incorporated, and also for Browning and Ferris Industries, 26 years at Waste Management, three and a half years at Browning and Ferris.” During that time, he had worked with “[t]rucks. Mostly trucks and recycling equipment, forklifts, payloaders,” testified Janousek, in the process “train[ing] people in safety and operating,” and supervising as many as “[s]eventeen mechanics and several container shop people.” Janousek contracted cancer, however, and, he testified, “was advised by a doctor to get a lighter duty job, that heavy lifting and stuff wasn’t going to be good for me.” So, he sought employment elsewhere and obtained it at Respondent.

Between December 4, 1999 and March 29, 2000, estimated Seurer, Janousek would be absent from work “probably a day a week [when] he would have to go to the doctor for one thing or another.” Still, based upon Janousek’s experience, he was highly regarded by Seurer. “Highly skilled, well qualified and a likable person to get along with,” testified Seurer.

Breiter claimed that he was as skilled a mechanic as Janousek: “I was as good as him. I’ll match up with him any day.” Given Janousek’s above-described background and experience, however, that testimony by Breiter at least raises an eyebrow. And Breiter acknowledged that his experience with forklifts had largely been acquired from working with Rhorda: “Herb taught me a lot. Herb taught me a lot about the hydraulics end of a forklift.” Thus, unlike Janousek, Breiter appears to have been acquiring forklift-rehabilitation skills as he worked for Respondent, as opposed to already possessing such mechanical skill before having begun working for it.

Furthermore, as pointed out above, “a big part” of Respondent’s forklift business involves repair of electric forklifts. As to that work, testified Seurer, Breiter “had no experience there.” Nor did Breiter have the slightest intention of learning such work. “I’m not an electric forklift repair person. I don’t claim to be. I don’t even want to be. I have no interest in them. If they got a running motor in them I’ll work on them but electric I don’t know that much about them,” conceded Breiter. Nor was that the only work at Respondent that Breiter did not perform.

After at least some forklifts have been refurbished, they are sanded and repainted. For the most part that work is done by Jay Seurer. Yet, Breiter acknowledged that Janousek “also did some painting in there too, yes.” In contrast, testified Breiter, “I didn’t” do any spray painting. Nor is it likely that he did any sanding, either. For it was the sanding of refurbished forklifts—in

preparation for repainting them—that generated part of the problem that led to certain events during March.

Both Breiter and Seurer agreed that the former had been complaining for some time prior to March about dust from sanding and fumes from painting in the shop, particularly when doors and windows were closed during winter months. Breiter testified that he had complained about the dust created by the "DA Sander which is an air sander that would sand off and rough up the surface of these--the panels and stuff on the forklift and that was dust in itself, you know, that was blowing around," and, in addition, had complained about the "over spray paint over spray all over." According to Breiter, "you just couldn't breathe that stuff," with the result that, "I was experiencing respiratory problems with it. I had headaches from it and I complained to him [Seurer] about it."

Breiter was not the only employee who voiced complaints. "Herb and I complained about it," he testified. "We had complained about it in unison numerous times," Breiter further testified. Seurer agreed that it had been both employees who voiced those complaints: "Herb and Jim said 'Hey, we should do something.'" As a matter of fact, those complaints had not been simply ignored; Respondent did attempt "'"something" to alleviate the situation for Breiter and Rhorda.

First, Respondent delayed sanding and painting until after Breiter left work for the day at 4:00 p.m. and, seemingly, after Rhorda left at 5:00 p.m. That solution worked for awhile. But, as time passed, sanding began to commence at around 3:30 p.m., though painting was not actually undertaken until after Breiter and Rhorda had left for the day. As mentioned above, Breiter's complaints had been directed both at sanding and painting conditions. So, the second attempted solution was to allow Breiter and Rhorda to cease work and, testified Seurer, "go up in the coffee room and sit down and have a long coffee break," an account confirmed by Breiter: "we'd go up in the office and just wait it out."

A third solution was proposed by Breiter. He testified that he proposed that Respondent install a "paint booth" with "a filtered trunk line" that would "induce fresh air and exhaust the contaminated air, if you will." That solution—which has been referred to in various terminology by witnesses and counsel; for example, "Filtering system. Duct work. Exhaust system," by Seurer—was acceptable to Respondent. It was eventually adopted. However, in somewhat more elaborate form and, as will be seen, not fast enough.

Respondent settled on an essentially three-component sand-and-paint abatement system: the filtering system proposed by Breiter, a concrete wall, and a tarpaulin curtain. Southside Heating & Air Conditioning, Inc. in Bloomington, Minnesota fabricated the filtering system. Breiter testified, and Seurer essentially confirmed, that he (Breiter) had contacted "a friend of mine in Bloomington, explained to him what I had in mind," after which, "[h]e built it, called me and told me when it was done and I went and picked it up," paying "for it with a check from" Respondent.

A particular problem in this case—and one which could have been fatal for a respondent in other situations—is Seurer's sometimes almost casual attitude toward dates and events occurring on them. All too frequently he seemed to be latching onto whatever date happened to occur to him at a particular moment, making little apparent effort to apply himself to attempting to recall precisely on which dates particular events had taken place. The result is sometimes confusing, conflicting and inaccurate accounts advanced by Seurer. Fortunately for Respondent, there is documentary evidence connected with the components of the sand-and-paint solution that it ultimately adopted.

For the filtering system which Breiter's friend fabricated, there is a statement from Southside Heating & Air Conditioning, Inc. and, in addition, a check from Respondent in payment for that system. Both are dated "3-2-00". Breiter testified that he had brought the system to Respondent's facility on March 3, where Jay Seurer took one look at it and said, "[t]hat thing ain't going to work," after which Breiter stored it "on top of the overhead guard on an electric forklift" until Monday, March 27 when, as described below, it was installed.

From the General Counsel's perspective, the implication seems to be that after March 3 Respondent had simply forgotten about the filtering system. But, clearly, that was not the fact. Breiter testified that "we were busy. We had other forklifts we had to get done and get out of there and so it [the filter system] set there for better part of a month." And, as mentioned above, Jay Seurer had expressed skepticism about the workability of the filter system fabricated by Southside. As a consequence, it appears that Respondent reviewed the situation and decided to include the filter system as part of a more elaborate sand-and-paint abatement arrangement.

Presented during the hearing was an invoice of CAMAS Concrete Products Division. It had been presented to Pivec Concrete. Pivec is the firm that erected the concrete wall portion of Respondent's overall sand-and-paint abatement solution. Co-owner Alice Pivec testified that the concrete block for the wall had been ordered from CAMAS; it was delivered to Respondent on March 24. Then, she further testified, the wall had been constructed on Saturday, March 25. Significantly, the CAMAS invoice shows a "Request Date" of "03/20/00", in the far-left column, for its enumeration of each item listed on that invoice. Alice Pivec testified that "03/20/00" meant that on that date those items had been ordered. More importantly, as it turns out, she further testified that discussions between her husband and Respondent about erecting the wall "would have been before" March 20: "Before the--before 3/20." On the following day began to unfold the sequence of events that led to Breiter's termination on March 29.

On Tuesday, March 21, Seurer acknowledged, Breiter left work early, threatening to report Respondent to the Environmental Protection Agency. "When I came back from lunch at noon I walked in the door and I had to squint to look back and I could smell it right away that they were painting," testified Breiter, "They were painting a forklift." He further testified that he said, "You guys just don't get it," and, "I just cannot breathe this stuff," after which he warned, "I've got a half notion to report you to the EPA," and left.

After arriving home on March 21, Breiter did not attempt to contact the Environmental Protection Agency; rather, he telephoned the Environmental Health Department of Scott County, Minnesota. He was connected with Joan Anderson, Environmentalist II for the Department. Breiter never identified himself by name, but said only that he was an employee of Respondent. He testified that he "asked [Anderson] if there was any rules or regulations that controlled commercial painting in a building and she says yes, there was," and he "told her what was going on" and said that he desired "to file a formal complaint with you and I'd like to have you follow through on it," even though "I'm probably going to lose my job over this." That last asserted remark became a subject of interrogation of Breiter during cross-examination.

It was pointed out that, while his prehearing affidavit included a description of his telephone conversation with Anderson on March 21, it included no mention of any statement to her by Breiter about probably being fired for reporting Respondent. Breiter acknowledged that to be a fact. He never explained why, if it had actually been said by him to Anderson, he had omitted mention of that remark in his affidavit. Nevertheless, he testified that, "I think she would testify to it that I told her that." However, Anderson did not "testify to it" when she appeared as a witness.

She testified that, during the telephone conversation, the unidentified employee of Respondent had said that "he was concerned about the fumes from painting" at Respondent, and "had asked that something be done about it and I believe currently nothing had been" and "he had told [Respondent] he was going to be calling the EPA and complaining about it," and "wanted it to be dealt with," or "basically just wanted something to be done about it." Anderson made no mention whatsoever of Breiter having voiced, during the conversation, any apprehension about being fired.

Anderson did eventually telephone Seurer on Thursday, March 23. However, that had not been Respondent's first contact with the Scott County Environmental Health Department. Nor, for that matter, had it been the first conversation between an official of that agency and Seurer regarding elimination or reduction of paint fumes in Respondent's Savage facility. Seurer testified that, approximately every two or three years, that department's personnel had inspected Respondent's facility concerning storage of hazardous materials such as batteries, oil and filters. "Basically they never worried about the paint," testified Seurer. Even had the Environmental Health Department been checking for excessive sand dust and paint fumes, it seems that it had never faulted their levels at Respondent. It is uncontested that Respondent had never been fined nor, even, cited by Scott County's Environmental Health Department.

With regard to that dust and those fumes, Seurer testified that "somewhere in the middle of March," he had telephoned Pete Schmidt of that department, seeking to obtain "information on how to build" a filtering system. According to Seurer, Schmidt had said, "I don't believe you need one," but, when Seurer had replied that Respondent wanted to install such a system, Schmidt had said, "You'll have to go to the City of Savage" for "prints to make this thing," or for "specs on how to do it," as well as for a building permit. For, testified Seurer, Schmidt had said that his department did not have jurisdiction over safety issues unrelated to hazardous waste disposal.

Although there is neither evidence nor representation that he was not available to testify, Schmidt never appeared as a witness, to corroborate that testimony by Seurer about their telephone conversation. Even so, some corroboration was provided by Anderson. She testified that, after having received Breiter's telephone call on March 21, she had "spoken to my boss," whom she identified as "Pete Schmidt," and that Schmidt "mentioned that he had already talked to [Seurer] a couple weeks ago," when Seurer was "questioning different things that" Respondent "could do and trying to find information of what [Respondent] could do for air quality." "As far as I know of, yeah," testified Anderson, Seurer's call to Schmidt had related to ventilation and painting: "we had been contacted by them earlier and just to give them information that Pete, my supervisor, had also informed them or given them a place to look." "Yes," she answered, when asked if that call to Schmidt had been one or two weeks before Breiter's March 21 conversation with her.

Breiter was not scheduled to report for work on Wednesday, March 22, though he did visit a customer's site that day, to inspect a forklift problem being encountered by that customer. He testified that he returned to Respondent's Savage facility on Thursday, March 23. There is no evidence that anything was said to him on that day, by anyone, about his having left work early two days earlier. Rather, he testified, "it was for the most part a pretty normal day. We were back working on forklifts and what have you until late in the afternoon. It was after 3 o'clock because we had coffee already." Apparently it had been at that point, according to Breiter's undenied testimony, when "Jim [Seurer] came out in the shop," and said to Breiter and Rhorda, "I want you guys to drop everything you're doing and you don't concentrate on nothing except getting that trunk line, that filter system, put in, get that curtain hung," adding, "We're going to get that block wall put in too." The inference that should be drawn from that undisputed

testimony, it is urged, is that a panicked Seurer had been reacting to a telephone call that he had received from Anderson. Viewing the evidence in its totality, however, that seems an unlikely possibility. In fact, there is basis for doubting the entirety of Breiter's testimony regarding Seurer's abruptly-issued directive.

Anderson testified that, at some point during the day on March 23, "I did call Jim Seurer," and "let him know that I had received a complaint and it had to do with the fumes that were in the painting, and I had talked to my boss, the one that he had called a couple weeks ago, and I wanted to follow up with him to see if he was doing something." According to Anderson, Seurer "said he had been putting in some ventilation piping already and was contacting different people on a paint wall to install."

Seurer agreed that he had been contacted on March 23 by Anderson. But he denied that her call had concerned him. In fact, asked whether Seurer had seemed alarmed by her call, Anderson answered unequivocally, "No." She testified that when she had given her prehearing affidavit, "I was asked if he seemed surprised when I called and I said no." "I'm not the EPA but I'm sure he was expecting a call," she opined, though obviously she could not have told Seurer which of Respondent's employees had telephoned her.

Had Seurer truly been anticipating a call such as Anderson made to him, then that fact detracts, at least somewhat, from an inference that it had been receipt of her call that had led to the March 23 purported remarks attributed to him by Breiter. If Seurer had been expecting a call from some government agency, after all, receipt of one would not likely have surprised him. Nor, seemingly, would it have panicked him into rushing abruptly to the shop and, there, instructing that everything should be dropped to install "that filter system," "get that curtain hung," and "get that block wall put in too." Moreover, there are certain other factors that support the implausibility of Seurer having abruptly issued such asserted instructions.

Had Seurer actually issued such a direction "after 3 o'clock," as Breiter testified, that left less than an hour for Breiter to begin doing the work, which Seurer had assertedly directed be performed, before the 4:00 p.m. normal conclusion of Breiter's workday. Further, it left less than two hours before Rhorda's normal workday ended at 5:00 p.m. Moreover, Breiter testified that, "Herb [Rhorda] was going to be gone Friday and Saturday," with the result that "there was no way I could install that thing by myself so as I recall the plan was to get the block wall installed. Once those people were out of our way -- because we both couldn't work together in there anyway, it's not a big area. Once they got the wall in and everything then the following Monday we'd start to get that trunk line put up."

Now, if Breiter was aware on Thursday, March 23 that Rhorda would not be at work during the following two days, that Breiter would need Rhorda's assistance to install the filter system, and that it would not be possible to install the filter system while the concrete wall for the paint area was being erected, then there seems no basis for concluding that all of those matters would not have been equally obvious to Seurer. In other words, had Seurer truly issued the above-quoted March 23 direction, attributed to him by Breiter, then it seems that Seurer would also have understood that he (Seurer) was issuing a meaningless direction: one which could not be implemented by "drop[ping] everything you're doing and … concentrat[ing] on nothing except getting the truck line, the filter system," curtain and wall put in. The wall first had to be erected; that was going to be done by Pivec Concrete, not by Respondent's employees. Quitting time was approaching by the time that Seurer had supposedly issued his directive. Rhorda was not going to be available to help Breiter during the following two days. The curtain was the last component to be installed in the overall system. In short, it simply makes no sense for Seurer to have hastily issued the March 23 directives attributed to him by Breiter.

To be sure, no "question of credibility" is ordinarily raised where witnesses' "testimony is uncontroverted." *NLRB v. Moore's Seafood Products, Inc.*, 369 F.2d 488, 490 (7th Cir. 1966). Still, absence of contradiction no longer means that testimony must be accepted, blindly and without regard to all else. See, e.g., *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (9th Cir. 1953), affd. 346 U.S. 482 (1953); *Woods v. United States*, 724 F.2d 1444, 1452 (9th Cir. 1984), "The hospital seems to assume that testimony that is not specifically contradicted must be believed; this is incorrect." (Citations omitted.) *Kasper v. Saint Mary of Nazareth Hosp.*, 135 F.3d 1170, 1173 (7th Cir. 1998). Accord: *NLRB v. Local 138 International Union of Operating Engineers*, 293 F.2d 187, 192 (2d Cir. 1961); *McLane/Western, Inc. v. NLRB*, 827 F.2d 1423, 1425 (10th Cir.1987). Nonetheless, that testimony is not contradicted or denied is a factor which is entitled to some weight. "Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation." (Citation omitted.) *Missouri Portland Cement Company v. NLRB*, 965 F.2d 217, 222 (7th Cir.1992). Here, three factors tend to show a lack of reliability for Breiter's undenied above-quoted account of what Seurer had supposedly said near the end of the workday on Thursday, March 23.

First, in connection with his description of his March 21 telephone conversation with Anderson, Breiter displayed a tendency to embellish accounts to enhance his own situation. As described above, he testified that he had told Anderson, "I'm probably going to lose my job over this." Yet, he admitted that he had not included that purported remark in his affidavit's description of that very conversation with Anderson—an omission that has independent probative value in assessing Breiter's credibility. See, 1 *McCormick on Evidence* (Fifth Edition, 1999), sec. 34, p. 127 ("Accordingly, if the prior statement omits a material fact presently testified to, which it would have been natural to mention in the statement, the statement is sufficiently inconsistent" (footnote omitted)). That inconsistency became even more pronounced when Breiter claimed that Anderson "would testify to it that I told her that." But Anderson, clearly a neutral witness with no seeming interest in the well-being of either side, did not "testify to it that [Breiter] had told her that" – that "I'm probably going to lose my job over this."

Second, given Seurer's prior contacts with the Scott County Environmental Health Department—with respect to "air quality," as Anderson put it—it seems unlikely, as an objective matter, that her May 23 telephone call to him would have somehow naturally panicked him into any sort of abrupt rush to the shop to direct Breiter and Rhorda to drop all other activity to install the filtering system. No one contested the testimony that the Environmental Health Department had no jurisdiction over air quality. Had such testimony been untrue, seemingly it would have been a relatively simple matter to contradict it—by asking Anderson or by introducing copies of statute or regulation under which that department operates. Moreover, it is uncontested that the Environmental Health Department had been periodically inspecting Respondent's facility. All else aside, however, Respondent had never been fined or, even, cited for poor air quality. So, even if the Department did have jurisdiction over air quality, it certainly had never penalized Respondent for excessive sand dust or paint fumes.

On brief it is argued that Breiter's willingness to contact Scott County's Environmental Health Department, considered in conjunction with Breiter's May 21 warning that he was going to contact "the EPA," would naturally breed fear on the part of Seurer about "inspection by the County or by another regulatory agency, one that would have jurisdiction over air quality complaints." Even given that dust and fumes had been disturbing Breiter and Rhorda, however, there is no evidence whatsoever that dust and fumes at Respondent rose to a level that did violate any agency's air quality standards. It is, of course, not absolutely inconceivable that Seurer could have anticipated a call from some agency other than the Environmental Health Department, such as the Environmental Protection Agency. Yet, there is no evidence whatsoever providing any sort of basis for an inference that Seurer naturally harbored, or likely

would have harbored, any such fear. Inference must be based upon something more than pure speculation.

The fact is that, as shown by fabrication of the filter system and arrangements with Pivec Construction for erection of the concrete wall, Respondent was already in the process of adding a separate paint area by the time of Anderson's telephone call to Seurer. That fact—coupled with the absence of any showing that Respondent's air quality did violate, or could reasonably have been perceived by Seurer as likely violating, any regulatory standard—leaves scant room for a reasonable inference that Seurer would naturally have been apprehensive about some sort of contact by a "regulatory agency … [with] jurisdiction over air quality complaints." In turn, absence of a reasonably based inference of such concern by Seurer is, itself, some refutation of the portrayal of his hasty trip to the shop to order that all other work be dropped to engage in activity which, in reality, could not be undertaken at the time of that supposed direction.

That latter fact provides the third factor tending to naturally contradict Breiter's above-described testimony about what supposedly had occurred during the late afternoon of March 23. As set forth above, installation of the filter system could not be made by Breiter alone. And Rhorda was not scheduled to work during the next two days. Moreover, the filter system could not reasonably be installed while work, not then yet started, progressed on erection of the concrete wall. Thus, to credit Breiter's testimony about Seurer's purported March 23 direction is to conclude that Seurer had issued what can only be characterized as a meaningless direction late that afternoon.

In any event, CAMAS's invoice and Breiter's testimony show that the concrete block for the wall, ordered on March 20, arrived at Respondent's facility on Friday, March 24. Thus, testified Breiter, "when I got there shortly after 7 o'clock on Friday morning there was a truck there with concrete block on it. He had a delivery order to unload." With that concrete block then on site, Pivec erected the concrete wall on Saturday, March 25. "I had agreed with Herb that I would be there to let the block layers in at 8 o'clock on Saturday morning," Breiter testified. As the block layers worked, Breiter took down and cleaned fluorescent ceiling light tubes. Then, he testified on Monday, March 27 he and Rhorda repaired a machine called the lift aloft, used it to install ceiling-tracks for the paint area curtain that was going to be installed, and "also installed the trunk line, the filter system."

On Tuesday, March 28, testified Breiter, installation of the track for the paint area's curtain was completed. That tarpaulin or tarp curtain appears to have been ordered on that same day, March 28, according to the invoice of TARPS Mfg. Inc., from whom it was obtained. But that may not have been the actual order date. The tarp had to be cut to specification for the curtain. Breiter testified that it had arrived at Respondent, "Tuesday afternoon late." So, it may well be that it had been ordered earlier, to allow time for it to be cut to specification, after which it was delivered to Respondent, with the invoice date reflecting that of actual delivery, as opposed to reflecting the date when the curtain had been ordered. In any event, Breiter testified that, "When we got there Wednesday morning [March 29] the curtain was hanging on the track." So far as the evidence shows, that had completed installation of the system. Breiter never claimed that the system as installed had not satisfied his and Rhorda's need for cleaner air when sanding and painting were to be conducted thereafter.

Breiter completed cleaning and reinstalling fluorescent light tubes on March 29. He testified that he also unloaded "a truckload of forklifts" and was sent "to Material Handling … to pick up and [sic] electric truck that they had to have back yet that night," both jobs which led to trouble and which will be discussed further in the following section. At this point the significant consideration is that Seurer terminated Breiter during the afternoon of March 29. As to that,

three people were present in the office when Seurer did so: Seurer, Breiter and Rhorda. No one called Rhorda as a witness though, again, there is neither evidence nor representation that Rhorda was not available to testify about what had been said during the termination exchange. Thus, the record is left with the accounts advanced by Breiter and Seurer. In that respect, both agreed that the latter had referred, during the exchange, to a prior remark by Breiter about possibly resigning. That also will be discussed in more detail in the following section.

Seurer testified that he had told Breiter, "Jim, you called me a couple times … saying you were going to hang it up," or, "Jim, in the past you've called me a couple times telling me you are going to hang it up." According to Seurer, he then said, "Today I'm accepting your resignation," after which Breiter "got up rather hastily and scampered out the door and I did not get a chance to talk to him about it or why." In fact, Breiter agreed that he had left right after Seurer had said, in effect, that he was accepting Breiter's earlier-voiced possible resignation-statements. So, there is no real conflict about the fact that Breiter had left the room without allowing opportunity for Seurer to say anything after having said that he was, in effect, discharging Breiter. On the other hand, Breiter also testified that, before Seurer had said that he was accepting the resignation, there had been an exchange of additional comments between the two of them.

According to Breiter, when he had arrived in the office, "Jim asked me how the red Dodge was working," and Breiter claimed that Seurer had been referring to the recently-replaced steering column on it. But, that claim appears to have been no more than Breiter's personal opinion regarding what Seurer had meant. As described in the following Section, it passed over a different incident involving "the red Dodge" which had occurred earlier on March 29.

After discussion of that subject, testified Breiter, Seurer asked, "What happened around here today?" and Breiter replied, "I don't know," inquiring, "As far as what?" But that seems to have been a somewhat evasive inquiry. For, Breiter acknowledged that, before Seurer could answer it, he (Breiter) had said, "Tommy came with that load of--semi load of forklifts and I unloaded them." As discussed in Section II, *infra*, while Breiter had been doing so, there had been an exchange between him and Janousek. From Breiter's testimony it is obvious that Seurer had been referring to that earlier exchange because, Breiter testified, when he mentioned unloading the forklifts, Seurer asked, "What happened between you and Al [Janousek]?" Breiter testified that he had answered, "I don't know," and added, "He come [sic] out and asked me if I needed any help and I told him no."

It had been then, testified Breiter, that Seurer "said, "Well, you remember when you called me on my cell phone,' he says, 'and you were threatening to quit,'" but Breiter "never got a chance to answer" before Seurer announced, "nothing has changed," and, "You're done." At that point, Breiter testified that he had retorted, "Oh, I'm not going to sit here and feud about it," after which Seurer said that Breiter could gather his tools and Rhorda would help Breiter load them. Interestingly, however, Breiter testified that, "I went back on the 30th of March in the morning" to get his toolbox and the tools in it. He never explained why he had not loaded his tools on March 29, as he claimed that Seurer had told him to do. The fact that he had not then done so is some indication that there had been no mention by Seurer of the tools on March 29—that, instead, consistent with Seurer's above-quoted testimony, Breiter had abruptly walked out before Seurer could say anything else.

II. DISCUSSION

There is no direct evidence, see *Belle of Sioux City*, 333 NLRB No. 13, slip op. at 17 (January 31, 2001), and cases cited therein, that Seurer had accepted Breiter's resignation – fired Breiter—because Breiter had involved Scott County Environmental Health Department in the air quality problem about which Breiter and Rhorda had been complaining. Seurer denied that Breiter's call to that department had motivated his decision to terminate Breiter. There is no evidence of any adverse remark by Seurer, or by any member of the Seurer family, about Breiter's contact with the Department, nor about Anderson's call to Seurer, as a result of Breiter's conversation with her. Consequently, the General Counsel is left to argue that unlawful motivation should be inferred. In so arguing, reliance is placed essentially upon four indicia of unlawful motivation.

First, while both Breiter and Rhorda had complained about the dust and fumes in the Savage facility, only Breiter had involved a government agency in that problem. Just as discharge of a union activist can "give rise to an inference of violative discrimination," *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980); see also, *NLRB v. Des Moines Foods, Inc.*, 296 F.2d 285, 289 (8th Cir. 1961), so, also, some evidence of discrimination is seemingly supplied by discharge of the only employee who engages in the protected activity of contacting a government agency to complain about some aspect of working conditions.

Second, there is relatively close timing between notice to Seurer on March 23 of the complaint to the Environmental Health Department and Breiter's termination six days later. "Timing alone may support anti-union animus as a motivating factor in an employer's action." (Citation omitted.) *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). No different rationale appears warranted when the employee's statutorily-protected activity had not involved a union, but instead had involved a complaint to a government agency about some aspect of working conditions. "Such proximity can lend support to a Board inference of unfair labor practices." (Citation omitted.) *NLRB v. Tennessee Packers, Inc.*, 390 F.2d 782, 784 (6th Cir. 1968).

Third, it is argued that Breiter was terminated without being afforded any opportunity to explain the work-related, legitimate complaints now voiced by Seurer. As will be discussed below, that is a factual assertion which, based upon Breiter's own testimony, is not accurate. However, it is accurate that failure to "provide [an employee] with an explanation for his discharge and [to] give him an opportunity to respond to the allegations," *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685 (8th Cir. 1996), cert. Denied 521 U.S. 1118 (1997), are indicia of unlawful motivation. For, unwillingness to allow an employee to defend himself/herself tends to show that the employer is not truly interested in whether misconduct actually occurred. See, e.g., *W.W. Grainger v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978); *NLRB v. Gogin*, 575 F.2d 596, 601-602 (7th Cir. 1978); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 48 (9th Cir. 1970).

The fourth factor centers on the motivation explanations advanced by Seurer from investigation through hearing. The General Counsel argues that, over time, Seurer has advanced shifting reasons for terminating Breiter. Accordingly, that argument proceeds, all of those reasons must be concluded to have been false ones—ones advanced to conceal the true motive which, it must therefore be inferred, had been an unlawful one.

Of course, in evaluating motivation issues, "the Board can consider all of the record evidence, including the respondent's explanation for the discharge. *Holo-Krome v. NLRB*, 954 F.2d 108, 113-115 (2d Cir. 1992)." *The Painting Co.*, 330 NLRB No. 136 (March 23, 2000).

"Where an employer's stated motive for discharging an employee is false, the inference is justified that the employer desires to conceal the true motive and that the true motive is unlawful." *Triple H Electric Co.*, 323 NLRB 549 fn. 1 (1997). See also, *McKenzie Engineering Co.*, 326 NLRB 473, 484 (1998), enfd. 182 F.3d 622 (8th Cir. 1999).

An inference that false motivation is being advanced can be drawn whenever a respondent, whether employer or labor organization, advances shifting reasons for action which is alleged to have been discriminatorily motivated. "When a party's story keeps changing, it is perfectly appropriate for the finder of fact to conclude that none of the various versions are true." *Precision Industries*, 320 NLRB 661 fn. 5 (1996). "When an employer shifts position several times in explaining why an employee has been fired, his own case is weakened, and the Board's conclusion that the true reason was for union activity is correspondingly strengthened." *NLRB v. Georgia Rug Mill*, 308 F.2d 89, 91 (5th Cir. 1962). Accord: *NLRB v. Superior Sales, Inc.*, 366 F.2d 229, 235 (8th Cir. 1966). Seurer had been the agent of Respondent who made the decision to terminate Breiter, by accepting the latter's previously-voiced thought that he might resign. There is no room for disputing that, over time, Respondent has advanced seemingly shifting reasons for that decision.

In his prehearing affidavit, Seurer initially listed two reasons for his decision: lack of work and, secondly, past expressions by Breiter of intention to hang it up. Later in that affidavit, Seurer enumerated other reasons for his decision: smoking up a storm, not getting along with anyone, not keeping the floor of a truck's trailer in good repair, damaging a gas station canopy, and running a good employee off.

Having changed counsel, Respondent submitted a position statement on June 19. Several motivation points are made in it. First, "because of a number of work-related problems [Breiter] exhibited, and the overall lack of work to sustain him as a full-time employee, Mr. Breiter was let go for bona fide business reasons unrelated to his claims that he was discharged for reporting a possible safety violation." The position statement continues in the following paragraph, "Seurer … made a decision to reduce the size of his crew and to use independent contractors in the future to perform tasks such as welding, painting and trucking, that Mr. Breiter performed." It should not escape notice that, as set forth in Section I, *supra*, Breiter had not performed any painting at Respondent.

Three pages later the position statement addresses the reasons enumerated by Seurer in his affidavit for having terminated Breiter: "Prior statements of Mr. Breiter to Mr. Seurer … that Mr. Breiter intended to 'hang it up'"; the "decision that given the limited amount of skilled work that Breiter was able and willing to do, the company could more efficiently reduce its employee costs and when an overload occurred, hire independent contractors to perform lower skill tasks that Mr. Breiter did"; "[t]he owner's son, Jay Seurer, and Breiter disliked each other and did not get along in the small shop area," and, "Jay had informed his father he was thinking about quitting because of the work collisions with Breiter"; "on occasion Al Janousek had left early because of a reaction to something that Mr. Breiter had said to him"; "on the day he was let go, Breiter pulled into the car part of a gas station with his flat bed-semi and damaged the station's canopy"; and, "Breiter had not complied with the owner's instructions relative to the maintenance of the company trailer, contributing to damage."

One point made in Seurer's affidavit is that what came to be referred to as the "tiff" with Janousek on March 29 had not been a reason for Seurer's decision to fire Breiter. Of course, that point is contrary to one of the above-quoted statements made in the position statement. Yet, called as an adverse witness, Seurer testified that that tiff "was part of" his discharge decision. When it was pointed out that he had stated in his affidavit that the tiff had not been a

reason for the termination decision, Seurer answered, "That may be true at the time." Asked if he had changed his mind since having given the affidavit, Seurer answered, "Yes, ma'am," and now, "It is part of the reason." "I don't know when I changed my mind but it was part of the -- part of the reason," Seurer next testified. That sort of testimony hardly supplies a basis for reposing confidence in any testimony advanced by Seurer for having decided to lawfully discharge Breiter. Indeed, according any confidence to Seurer's defense is diminished further by obviously false reasons that have been advanced for that discharge decision.

As pointed out above, Breiter's "smoking up a storm" was one of the motivation factors enumerated by Seurer in his affidavit. Yet, that reason was never repeated in the position statement, nor when Seurer testified, as a purported reason for the termination decision. With reason, as it turns out. It is uncontroverted that both Jay Seurer and Rhorda were smokers, also. Moreover, it is undisputed that Rhorda smoked even more than Breiter. Respondent presented no evidence that smoking in the Savage facility was prohibited. Seurer never claimed that he objected to anyone smoking while working at Respondent.

The position statement specifies that "on the day he was let go, Breiter pulled into the car part of a gas station … and damaged the station's canopy," and, in fact, Breiter acknowledged that he had damaged a station canopy when he drove into the wrong gas aisle. The "real tall mast" on the forklift or tractor lift that he was transporting "hit the canopy and put a dent in the facing in the canopy," testified Breiter. The problem for Respondent is that that incident did not occur on March 29, as the position statement asserts. Rather, acknowledged Seurer, "That took place about two years ago."

Notwithstanding the foregoing points, however, it must never be overlooked that evaluations of motivation under the Act are not one-dimensional. The fact that a respondent advances shifting or, even, false reasons does not dictate, to the exclusion of all else in the record, that the true motive had been one proscribed by the Act. In *Precision Industries, supra*, the Board held specifically that it "reject[s] any suggestion that the 'inconsistencies, contradictions, improbabilities and aberrational and shifting explanations' in the testimony of the Respondent's witnesses 'necessarily compel' the conclusion that the Respondent's true motive … was discriminatory within the meaning of the Act." (At 661.)

The Board pointed out in footnote 4 of that decision, "Both the court in *Shattuck Denn [Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)] and the Board in *Williams [Contracting*, 309 NLRB 433 (1992) inferred unlawful motive from explanations found to be pretextual, but not from pretextual explanations alone; other evidence of unlawful motive existed as well." In fact, that approach to motivation-evaluations under the Act is consistent with the guideline which the Supreme Court has directed should be followed generally when evaluating discrimination allegations: "the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff," (citation omitted) but leaves it only "*permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products, Inc.*, __U.S.___, 120 S.Ct. 2097, 2108 (June 12, 2000). That is the very course which the Board has been following: "that the inference of unlawful discrimination [is] *permissible*, not *compelled*." *Precision Industries, supra*.

Indeed, that approach is soundly grounded in both analytical and practical considerations. "[I]t is to be remembered that [respondents are] required to establish their *Wright Line* defense[s] only by a preponderance of the evidence." (Footnote omitted.) *Merillat Industries*, 307 NLRB 1301, 1302 (1992). See also, *Maple Grove Health Care Center*, 330 NLRB No. 121, slip op. at 3 fn. 14 (March 3, 2000). Where false or shifting defenses exist, it

does not follow that animus toward statutorily-protected activity is the sole or only reason left for allegedly discriminatory conduct. *Society to Advance the Retarded & Handicapped*, 324 NLRB 314, 315 (1997). Rather, "there might well be other reasons why" a respondent would desire to terminate employees "and … want to avoid making those reasons known." *Marriott Corporation*, 251 NLRB 1355, 1360 (1980). "Those explanations might have been offered in an attempt to conceal a violation of some other statute instead of the Act, or a motive that may have been base but not unlawful at all." (Footnote omitted.) *Precision Industries, supra*.

As a practical matter, an employer who effects a discharge for purely lawful reasons might well attempt to try to fortify its legitimate motivation by adding reasons that, in fact, had not actually been ones that had motivated the challenged decision. Such conduct is hardly to be condoned. Indeed, as must be obvious from what has been said above, such conduct can operate in some situations to undermine an otherwise legitimate defense. Even so, it is a natural human reaction to attempt to tack down even a legitimate reason--by attempting to buttress legitimacy with added, though not truly relied upon, complaints about alleged discriminatees' inadequate performance. In addition, one characteristic of James Seurer must be taken into account.

He did not appear to be a polished speaker and, beyond that, did not seem to be someone who organized his thoughts well. Not infrequently he would start to answer a question but, then, launch into not necessarily related accounts concerning points which he felt should be made, though they were tangential—indeed, sometimes unrelated—to the subject sought by questioning. As a consequence, his testimony turns out to be not always a model of logic, much less of responsiveness. Now, "narration" is one "factor[ ] to be considered in evaluating the testimony of a witness," "INTRODUCTORY NOTE: THE HEARSAY PROBLEM" of Advisory Committee's Note to Article VIII of the Federal Rules of Evidence. And "narration" is not simply a question of who may happen to be the most facile or polished speaker—who can most successfully persuade people to purchase snake oil from the back of a medicine wagon. Instead, the core consideration is whether "the witness' language convey[s an] impression accurately?" (Footnote omitted.) 2 *McCormick on Evidence* (Fifth Edition, 1999), sec. 245, p. 93.

In making that assessment, "[i]t is well to remember that the lay persons [appearing as witnesses and as affiants, no less than as prospective jurors] may never have been subjected to the type of leading questions and cross-examination tactics frequently … employed," *Patton v. Yount*, 467 U.S. 1025, 1039 (1984), during investigations and hearings. That is a concern to which particular attention must be paid whenever questioning is being conducted by counsel other than the one who is representing a party-witness. See, e.g., *Brown Co.*, 305 NLRB 62, 68 (1991). Under examination in such circumstances, a layperson who tends to be disorganized in thought and expression, and who regards himself/herself to be in a defensive position, hardly is likely to become organized and suddenly begin articulating events and explanations with great logic. It bears pointing out that such situations involve no fault by investigator or by examining counsel—here, in fact, counsel for the General Counsel seemed to be conducting herself in her usual professional manner. The point, however, is that the situation inherently leaves lay witnesses, having difficulty with logic and with expressing themselves in a perfectly logical manner, in a position where their very lack of logical articulateness can unfairly operate to their disadvantage. That seemed to be the situation with James Seurer.

There was support for most of his criticisms voiced about Breiter. For example, Breiter may not have smoked up any greater storm than Jay Seurer or Rhorda. But, admittedly, he did smoke. Given that fact, it is hardly illogical, at least for some, to wonder why a smoker would complain about dust and fumes affecting his ability to "breathe" and causing "respiratory

problems," as Breiter had done. Presumably those same consequences would result from smoking. That seems to have been the limited point which Seurer had been attempting to make: not that smoking had been so much a reason for termination, but instead a reason for doubting the genuineness of a claim that dust and fumes truly had been affecting smoker Breiter's ability to "breathe" and were causing him "respiratory problems". To be sure, Breiter's situation was not actually inconsistent. Nevertheless, Seurer is entitled to his opinions.

Similarly, the service station canopy incident did not occur during 2000, but instead two years earlier. Yet, attribution of that incident to "the day [Breiter] was let go" was made by counsel in a position statement, not by Seurer. There is no evidence concerning the care with which Seurer reviewed that position statement before it was submitted during the investigation. Probably Seurer exercised minimum care in doing so, if he bothered at all to review it, given his display of less than perfect care in what he said as he was testifying, when he was trying to make points that he though were important, regardless of the responsiveness of his answers. Certainly there is no evidence that Seurer had been trying to conceal or misstate the year of that incident. When testifying, he freely acknowledged that it had occurred two years before March 29. Given the different incident that did occur on March 29 at a customer's location, as described below, it is conceivable that Seurer either failed to explain with sufficient precision to counsel the difference in time between two separate incidents or, alternatively, that counsel merely confused the one with the other.

When called as an adverse witness, Seurer was asked if his termination decision had resulted from "an accumulation of little things about" Breiter. He answered, "Yes." True, Respondent's insurance had covered some of the damage caused the canopy. But no one disputed Seurer's testimony that its policy, at least as of the time of the accident during 1998, had a $500 deductible. Of course, that is not an enormous amount. Yet, for a small business owner it is not inherently chump-change. And Breiter admitted that the accident "was dumb on my part." There is no evidence that Seurer had viewed that accident any differently. Nor is there any basis for concluding that, over the course of the ensuing two years, Seurer had somehow forgotten that Breiter had rammed the station's canopy during 1998. In fact, there is no evidence that anyone else employed by Respondent—or, even, known to Respondent—had caused or been involved in a like or similar accident.

Beyond those two factors, the others mentioned by Respondent—in the affidavit, in the position statement, during the hearing—are all ones that occurred, as supported either by admissions or by other evidence. For example, it seems beyond dispute that Breiter had experienced difficulties getting along with co-workers and, as well, with others. As to the latter, Seurer testified that '[i]t just seemed like…every Friday morning or whenever the laundry guy came" to deliver cleaned uniforms, Breiter complained to that "guy" about the quality of the cleaning work. Breiter agreed that he had "complained to the laundry guy" about such matters as "the pocket sewed shut" and "four set of clothes [sent] and you got two back." Seurer conceded that at least some of Breiter's complaints had been justified. "The quality of the laundry today is not what it was years ago," testified Seurer, and "pockets there is [sic] going to be holes in them and pockets sewn shut and lord only knows what."

More significant was the relationship between Breiter and Seurer's son, Jay. "Jay and him tangled," testified James Seurer, and "they didn't connect very well," but "just seemed like they'd get in each other's faces" over such items as where Jay Seurer "parked his car, how he played the radio," as well as over Jay Seurer moving things in the shop. Breiter agreed that he and Jay Seurer did not get along: "I never tried to have anything to do with Jay any more than he tried to have anything to do with us, with me especially." As had James Seurer, Breiter acknowledged that he had complained to the elder Seurer about his son's loud music and

where Jay Seurer parked his car. Breiter further testified that there had been more than one occasion when Jay Seurer had moved tools and parts laid out to repair forklifts, with the result that Breiter "had to go chase all that stuff down" to be able to resume work that he had been performing, before having gone to lunch or break.

In addition, testified James Seurer, there were instances when "Jay would ask Jim [Breiter] to do something," but Breiter would bridle at doing so. James Seurer testified that he suspected that the problem was that "Jay is not the easiest person," and that "it's hard for an older person" such as Breiter, as well as James Seurer, to take direction from a younger person. However, testified James Seurer, it caused an operations problem because "Jay would always end up coming to me" and asking, "Dad would you get Jim to do this for me," and, then, the elder Seurer either had to ask Breiter to do what needed doing or, alternatively, to ask Rhorda to have Breiter do the work.

When he was interrogated about the subject of balking at taking directions from Jay Seurer, Breiter seemed to be trying to be cagey in his responses, advancing mostly guarded and rather vague answers. "No," he answered unequivocally at one point, he had never refused Jay Seurer's requests to pick up loads at certain times. Asked if he had complained about taking directions from Jay Seurer, however, Breiter seemed to be evading a direct answer, by responding, "I never ever took directions from Jay." Of course, that answer, while not responsive, did tend to confirm the testimony by James Seurer that Breiter would bridle at taking directions from Jay Seurer.

Once again Breiter was asked if he had ever complained about being given directions by Jay Seurer. "I don't believe so," Breiter answered that time. But such an answer is equivocal, more akin to a lack-of-recollection answer than to an unequivocal denial. Of course, lack of recollection does not suffice as refutation of positive testimony and, accordingly, falls short of creating an issue of fact. *Indian Hills Care Center*, 321 NLRB 144, 150 (1996). See also, *NLRB v. Shelby Mem'l Hosp. Ass'n*, 1 F.3d 550 (7th Cir. 1993). Essentially the same result is left by Breiter's "don't believe so" answer.

Breiter further compounded the inherent insufficiency of that equivocal answer by voluntarily adding, "I don't understand that he had ever given me any directions." Well, an expression of subjective characterization or opinion hardly helps. Either Jay Seurer did or did not give Breiter directions, as a matter of fact. Breiter's "understand[ing]" of what had been said by Jay Seurer is no less equivocal and evasive than "I don't believe so." Indeed, in a small shop, with so few non-family employees, it seems rather difficult to conclude, as an objective matter, that at some point the owner's son would not have given at least some directions to every non-family employee.

James Seurer testified that both his son and Breiter had threatened to quit, at one point or another. "For months," testified James Seurer, Jay Seurer had been saying, "Hey, you know, I've got to get a better arrangement going with Jim or I'm quitting," though Jay Seurer apparently never did actually quit. Now, there is no corroboration for that testimony by James Seurer. Jay Seurer never appeared as a witness, though there was neither evidence nor representation that he was unavailable to testify. Moreover, as an objective matter it seems implausible that the owner's son would truly quit over poor relations with a non-family employee—or that his owner-father would allow that to happen. "Jay is my heir. My son," testified James Seurer. It seems more probable that, had Jay Seurer actually tendered his resignation because of poor relations with Breiter, at that point Breiter would have become a former employee of Respondent. Nonetheless, it is not implausible to believe that Jay Seurer might, at times, have become so frustrated with Breiter that the younger Seurer might have uttered hollow warnings of intention to

quit. A failure to supply corroborating testimony–about such threats by Jay Seurer—standing alone, is not necessarily fatal. See, e.g., *Laborers Local 190 (ACMAT Corp.)*, 306 NLRB 93 fn. 2 (1992); *C.P. & W. Printing Ink Co.*, 238 NLRB 1483 (1978); and, more generally, *United States v. Ginn*, 87 F.3d 367, 369 (9th Cir. 1006).

Certainly there was corroboration for James Seurer's testimony that Breiter had threatened to resign because of Jay Seurer. Breiter testified that, after an early January incident when Jay Seurer had moved tools and parts already laid out by Breiter and Rhorda to repair a forklift, he had telephoned James Seurer and "said if he didn't do something about Jay coming out there and totally disrupting things," that "I'm going to consider walking." According to Breiter, James Seurer said he would "talk to" Jay "and that was the last I [Breiter] heard of it." For his part, James Seurer testified that Breiter had "twice" said that he intended to "hang it up," and, further, Seurer testified that those statements by Breiter had occurred "probably in January once and maybe January or early March." When he was asked if he had ever renewed his acknowledged early January threat to quit, Breiter answered merely, "Not to my knowledge." That is not a direct denial, but is as equivocal as his "don't believe so" answer discussed above. In any event, whether it happened once or twice, it had been Breiter's quitting assertion to which James Seurer was referring during the March 29 termination conversation described at the end of Section I, *supra*.

Asked how Breiter got along with his wife Donna, James Seurer testified, "Oh, just so-so I would say," and referred to an incident when Breiter had made her cry. Seurer's testimony about such an incident was quite vague: "I just--I can just remember it. I can't tell what--what the circumstances were of it. I'm not going to elaborate because I can't. I just remember her -- or of it." No less vague about such an incident was Breiter. Asked if on one occasion he had made Donna Seurer cry, Breiter did not deny that such an incident had occurred. Instead, he answered only, "I have no recollection of that, sir." Thus, the record is left with James Seurer's testimony that such an incident had occurred, but with no details of what had occurred, and with Breiter's less than categorical denial that, in fact, such an incident had occurred. Donna Seurer did not appear as a witness, though there was neither evidence nor representation that she was not available to testify.

It was against that background that the first of two March 29 incidents, mentioned near the end of Section I, *supra*, occurred. That was the "occasion Al Janousek left early because of a reaction to something that Mr. Breiter had said to him," as the position statement put it, and to running good employees off, as Seurer put it in his prehearing affidavit. As described by Breiter and Janousek, the reality is that Janousek was probably as responsible, possibly more so, for the "tiff" between them that day. However, there is no evidence that Seurer could have realized as much on March 29.

A load of used forklifts had to be unloaded that morning. That was Breiter's responsibility, according to Seurer; Breiter did not disagree. At approximately 9:15 a.m. Breiter got on Respondent's 10,000-pound forklift to unload the forklifts from the delivery truck. Janousek offered to help unload them, but Breiter replied that he did not need any help. According to Breiter, there was oil on the bottoms of those "older forklifts that have been running around forever and ever," and unloading had to be handled with special care to avoid having one or more of them "slide off [Respondent's] fork, tip over."

Breiter testified that he had merely said to Janousek that he did not need any help because, "I'm going to let the forklift do the work"; Janousek testified that Breiter had "told me no, he didn't need help. He'd use a forklift and he told me that twice and it kind of set me off." That is, Janousek took offense at Breiter's reply. Breiter testified that, at that point, Janousek

said, "You sure are a cocky son of a bitch." When he asked Janousek to repeat what he had said, testified Breiter, Janousek added "the old 'm f'r' word to it and I just told him to buzz off."

Janousek agreed that he had "told him he was pretty f'n cocky and I didn't like his attitude." According to Janousek, Breiter retorted, "You don't sign my paycheck," and, "I'll use any attitude I have," adding, "And by the way your quantity and quality of work is in question here too." Though available to be recalled during rebuttal, Breiter was not recalled as a witness and, accordingly, never denied having made that latter remark to Janousek on March 29. That is significant, for it appears that it had been that latter remark which upset Janousek.

Janousek testified that, after returning and completing the job he had been working on, he had asked Rhorda "if my quality and quantity of work was in question," but Rhorda said that it was not. Then, Janousek continued, he had asked Rhorda, "why didn't you straighten, you know, Jim's mind on that," and, as he was still "kind of mad" about what Breiter had said, told Rhorda, "I'm going to go home until you get this stuff ironed out. You got my phone number. Call me. I'm not going to work with these kind of attitudes." To be sure, Janousek never testified that he had said in so many words that he was quitting. Even so, a reasonable interpretation of his final words to Rhorda surely is that they had been words of farewell, if Respondent took no action to straighten out Breiter. Breiter acknowledged that Janousek had "got[ten] mad," and that, "[h]e left" work on March 29.

Seurer had not been at Respondent's facility when the foregoing events had occurred. He testified that when he did return "[a]round 11--12 maybe," his "wife or my son told me that Al had left, walked off the job." In fact there can be no dispute about the fact that Seurer had known of the tiff between Breiter and Janousek before having terminated Breiter. As described in Section I, *supra*, Breiter testified that, during the termination conversation, Seurer had inquired, "What happened between you and Al?"

From investigation through hearing, Seurer acknowledged that it had not been the occurrence of a "tiff" between Breiter and Janousek that had disturbed him (Seurer). Nor, he further acknowledged, had it been the occurrence of the "tiff" that had led him to decide to terminate Breiter. However, the tiff had led Janousek to abruptly leave work, accompanied by words that could reasonably be construed as expressing an intention not to return—"going to go home until you get this stuff ironed out"; "I'm not going to work with these kind of attitudes"—absent some sort of corrective action by Respondent.

"I need Al," testified Seurer; "I was hoping he wouldn't quit permanently." That Seurer truly had been concerned on March 29 about the possibility that Janousek was not returning–was quitting—is shown by the step which Seurer took after work on March 29: after he had discharged Breiter. He testified that he telephoned and informed Janousek that Breiter no longer was employed by Respondent. Janousek confirmed that testimony: "My boss, Jim, called me and told me that they were going to try and iron out the problems," and that Breiter had been let go.

Janousek's abrupt departure from work was not the only unusual event that occurred on March 29. Respondent has what Seurer referred to as "the smaller delivery unit" which, he testified in response to questioning when called as an adverse witness, consists of a red Dodge truck or tractor and a blue Miller trailer. After the exchange with Janousek on March 29, Breiter was told to take that unit to Material Handling, about five blocks away from Respondent's facility, to pick up an electric truck. As he had been loading it, testified Breiter, "the steer wheel broke through the board" floor of the trailer. "That's right," he agreed, that put him out of commission and he had to wait at Material Handling for assistance. That was provided by Jay

Seurer who "[b]rought a railroad jack over" and, then, had to repair the trailer after getting it back to Respondent's facility.

It is not exactly clear from the totality of the testimony what precisely had caused the damage. Seurer testified that the floor of a trailer "will not hold a load in itself" and so, "we have to double--double lay the floor….with steel or wood or steel double wood." The piece on the Miller trailer had come loose on March 29, testified Seurer, because "bolts that hold it down came loose," as a result of "twisting" of the trailer as it was ordinarily operated. The loose board then did not supply the needed support for the trailer's floor. Seurer denied that the board had been rotten. But, that was what Breiter testified had been the situation: "The board kind of heaved down. It was like a bridge plank. It was rotten." However, that is not the crucial point in connection with what had occurred at Material Handling on March 29. Three other points turn out to be the truly significant ones in that regard.

First, Breiter testified that it had taken Jay Seurer "[t]wenty minutes at best" to complete operations with the jack at Material Handling. Of course, the trailer then had to be hauled to Respondent's facility and, there, be repaired. James Seurer estimated that "there was a couple hours lost time by the time Jim went down there from the time he started until we got him back to the shop and got unloaded." Then, he further estimated, it had taken "a total of six hours," maybe more, to effect repairs on the trailer. "Oh, yeah," agreed Breiter, it had taken more than 20 minutes to repair the trailer, once it arrived back at Respondent's facility. "Could it have taken as much as six hours? I suppose it could of," he further agreed. Obviously that represented lost work time for Jay Seurer and whoever worked with him repairing the trailer's floor.

Second, Seurer testified that in the past, "that plywood, the top layer, would come loose and each time we were busy so we'd set it off to the side and one day when we felt in the right mood we'd put it back on if we didn't fall through the trailer floor first." In fact, it is uncontroverted that the trailer's floor had broken through once in the past. Against that background, Seurer testified that, "I had told Jim on different occasions to put that darn piece on" prior to March 29—"I told him about ten times to fix" it.

Asked during cross-examination if he had been told by Seurer prior to March 29 to ensure that the trailer floor was secure, Breiter answered, "I have no recollection of that ever, ever happening." When he was asked if he was saying it never happened or, only, that he did not recall if it ever happened—the point made above from *Indian Hills Care Center* and *Shelby Mem. Hosp. Ass'n v. NLRB*—Breiter responded, "I don't recall it ever happening." Thus, he never effectively denied Seurer's testimony that he (Breiter) had been told before March 29 to ensure that the trailer was repaired. In fact, before cross-examination concluded Breiter ultimately admitted—"Yes"—that he had been told by Seurer to "make sure that thing was bolted down and double planked[.]"

Appreciating that inconsistency between Breiter's answers given during cross-examination, an effort was made during redirect examination to rehabilitate the situation. Breiter was asked what he had been told by Seurer prior to the trailer-floor's breaking. His meandering answer hardly provides a basis for relying on his testimony:

> I recall don't call -- recall anything as far -- what he wanted to my -- to the best of my knowledge I can recall he wanted a piece of plywood, which we used to have a piece of plywood on the deck, but with forklifts the way they are they are so low to the ground when we put that plywood on there it chewed it off and that's what -- that's how it got

> tore off of there because they are so low to the ground it got chewed off and it never got put back on. We were working on different ways to try and remedy that problem.

He then denied that he had ever "ignore[d] any direct orders by Mr. Seurer to repair something on that trailer[.]" But, of course, the electric truck concededly had broken through the trailer's floor on March 29.

Third, any argument that Seurer had not been truly concerned about what had occurred at Material Handling, is disputed by Breiter's testimony that Seurer had asked, during the termination exchange, "how the red Dodge was working," as quoted in Section I, *supra*. The fact that Seurer asked such a question shows that, by the time of the termination exchange, Seurer knew what had occurred, was concerned about the incident and, most importantly, was affording Breiter the opportunity to explain why the trailer had broken through. As to the latter point, however, Breiter chose to place his own spin on Seurer's question.

The complete testimony advanced by Breiter regarding Seurer's question was: "And Jim asked me how the red Dodge was working because we had just replaced the steering -- steering column on it." So far as that testimony shows, however, the portion after "working" constituted no more than an effort by Breiter to place a particular interpretation on Seurer's question—one more favorable to his position in this proceeding, than would be an acknowledgement that Seurer had been referring to what had taken place earlier that day at Material Handling.

True, no one disputed Breiter's testimony that "we had just replaced the steering -- steering column in" the red Dodge tractor. Yet, he never explained what "just" meant. There is no evidence that the tractor's steering column had been replaced as late as March 28, nor on any day immediately preceding that date. In contrast, the red Dodge tractor had been hauling the blue Miller trailer on March 29. The two—tractor and trailer—constituted the single unit that Breiter had taken to Material Handling that day. There, the trailer had broken through, thereby incapacitating the entire unit—red Dodge tractor and blue Miller trailer—until Jay Seurer arrived with the jack to raise the electric truck, so that the rig could be taken back to Respondent's facility for repair. Against that background, one would have to be chief gullible to accept that Breiter had truly believed that Seurer's question about "the red Dodge" was a reference to the tractor's steering column, as opposed to what had occurred with the entire unit earlier that same day.

Therefore, by Breiter's own admission, before having been told that he was being terminated, he had been asked by Seurer both about the damaged rig and, also, about the tiff with Janousek. In doing so, he had been given an "opportunity to respond to," *Handicabs, Inc. v. NLRB, supra*, and explain those two unusual events which obviously were concerning Seurer on March 29. True, as usual, Seurer may have been inartful in his phrasing of those questions to Breiter. But, it is unbelievable that Breiter had been completely unaware of the events about which Seurer, in his fashion, was inquiring. Indeed, Breiter did eventually admit to Seurer that he knew to what Seurer was referring when the latter asked, "What happened between you and Al?"

As to the latter incident, it does seem that Janousek had overreacted to Breiter's decline of assistance unloading forklifts. On the other hand, it appears that it had been Breiter's uncontested challenge to the "quantity and quality of [Janousek's] work" that had led Janousek to, first, question Rhorda about those two subjects—"quantity and quality of work"—and, then, to announce that he was "going to go home until you get this stuff ironed out," and, "I'm not going to work with these kind of attitudes." Thus, it was not the tiff between Breiter and Janousek,

itself, that led to Seurer's concern; it was the fact that it reasonably appeared that Janousek no longer intended to work for Respondent if Breiter continued doing so.

Whatever Breiter's mechanical abilities, he could not paint and admittedly would not learn to work on electric forklifts. Janousek did both. Moreover, his background appears to show that he possessed more mechanical experience than did Breiter, who acknowledged that he was learning facets of the job from Rhorda. Obviously, confronting a choice of having to continue working with only one or the other of those two employees, Breiter would have been the logical selection for severance.

That choice becomes even more logical, given that Breiter's "tiff" with Janousek had not taken place against a clean-slate background. Breiter admitted that he and Jay Seurer had been unable to get along. He had at least one clash with Donna Seurer. He even had ongoing disputes with the laundry delivery person. Obviously, Breiter could be a difficult person with whom to get along. There is no basis for concluding that Seurer could infer that Breiter would somehow become less contentious after March 29. Thus, there was no reasonable basis for Seurer to conclude that, were he able to persuade Janousek to return to work, Breiter would not again clash with Janousek and, in turn, lead the latter to once more quit.

True, Seurer had in the past persuaded Breiter not to quit when the latter had said that he might do so. But, that instance, or those instances, had occurred before the events of March 29. Before then, Breiter's clashes had been with Seurer's son and, seemingly, wife. Both are family-members. As such, it seems unlikely that either one of them would simply quit working for Respondent, Jay Seurer's professions of intention to do so to the contrary notwithstanding. But, Janousek was not family. He had cancer and, accordingly, was supposed to avoid stressful situations. Viewing the matter from Seurer's perspective on March 29, there was every possibility that, should Janousek return, there would occur another tiff with Breiter and that Janousek could not then, again, be persuaded to return to work with Respondent.

It was the events of March 29 that obliterate any timing argument that might otherwise support the allegation of unlawful motivation. To be sure, only six days earlier Seurer had been contacted by Anderson. It had to be obvious to Seurer, in view of what had occurred earlier, that her call had resulted from a complaint made by Breiter. On the other hand, Breiter's termination occurred within hours of Janousek's apparent expression of intent to quit, as a result of the tiff with Breiter, and, in addition, within hours of the damage to the rig at Material Handling. Those two incidents were admittedly both mentioned to Breiter by Seurer, before the latter had said that he was accepting Breiter's earlier resignation statement(s). There is no basis in the record for inferring that Seurer might not have taken a different course, had Breiter advanced satisfactory explanations for both incidents when questioned about them by Seurer. Those intervening March 29 incidents, therefore, give rise to a timing factor more favorable to Respondent than to the General Counsel. That is, "that [Seurer's] decision to fire [Breiter] was made [virtually] contemporaneously with [those two March 29 incidents], …strongly indicates that [those incidents were] the sole motivating cause of [Breiter's] dismissal." *Dade Tire Company*, 244 NLRB 244, 244 (1979).

Turning to another motivation indicium, as pointed out above, it must have been obvious to Seurer that it had been Breiter who had complained to Scott County's Environmental Health Department. So far as the record discloses, Seurer would have understood that Breiter had been the only employee to take such an action. In view of the totality of the circumstances, however, Breiter's activity can be characterized as no more than a "minimal amount" of statutorily-protected activity. Such a situation "detracts from [a] conclusion that [Breiter's contact with that agency] was the reason for" Seurer's termination decision. *NLRB v.*

Brookshire Grocery Co., 837 F.2d 1336, 1340-1341 (5th Cir. 1988). See also, *Ronin Shipbuilding, Inc.*, 330 NLRB No. 65 (January 7, 2000); and *Leather Agent, Inc.*, 330 NLRB No. 100, slip op. at 2 (February 16, 2000).

There are several reasons for concluding that Breiter's statutorily-protected activity had been only minimal, viewed from Seurer's perspective. Based upon past contacts, which Anderson confirmed her boss said had occurred, Seurer knew that the Environmental Health Department had no objection to air quality in Respondent's facility. In fact, he also knew that the Department had no jurisdiction over air quality. Breiter's complaint to that department was effectively meaningless. Furthermore, by the time of Anderson's call to Seurer, Respondent was already in the process of correcting the dust-and-fumes situation about which Breiter was protesting. Indeed, the entire system had been installed, as Breiter acknowledged, by March 29. There is no basis for inferring that Seurer had been disposed to retaliate against Breiter because of the latter's complaint. To the contrary, so far as the evidence shows, even without that complaint to Scott County, Respondent was going to install the filtration system.

True, Breiter had warned that he intended to go to the EPA. A week having passed since Breiter had made that statement on March 21, there was no indication as of March 29 that, in fact, Breiter had contacted the Environmental Protection Agency, nor any government agency other than Scott County's Environmental Health Department. Nor does the record furnish any basis for inferring that, as of March 29, Seurer viewed contact with any other government agency as a likely course for Breiter to follow. To the contrary, by that date Respondent had seemingly corrected the problem about which Breiter had been complaining. Again, viewing the situation on March 29 from Seurer's perspective, there simply was no basis for him to have feared that Breiter might be contacting, or had contacted, any other government agency. Beyond that, there is no legitimate basis for inferring that Seurer would have feared, had Breiter done so, that Respondent might suffer some sort of detriment, were it to be contacted by a government agency other than Scott County's Environmental Health Department.

In sum, an inference of unlawful motivation is not warranted by the indicia that the only employee discharged had been the one who had complained to a government agency, that no pre-discharge opportunity had been afforded Breiter to explain the March 29 conduct leading Seurer to make the discharge decision, and that the discharge had been effected only six days after a government agency's notice to Respondent that an employee, obviously Breiter, had complained to it. That leaves for consideration Respondent's "lack of work" assertion.

Respondent's busy season would be starting by mid-April when construction work began to pick up. Yet, there is no evidence that Respondent had ever employed during its busy season so many persons as were on its payroll by March 29: two family members–James and Jay Seurer—and three non-family members: Rhorda, Breiter and Janousek. As pointed out in Section I, *supra*, so far as the record discloses, for over a decade Respondent had gotten along with only James Seurer and his progressively less part-time son, Jay, performing repair and resale work. During the early 1990s Respondent had been able to perform that work, including during the busy season, with the two Seurers and Rhorda, at least so far as the evidence shows. After 1996, it was seemingly able to perform busy-season work with James and Jay Seurer, Rhorda and Breiter, a total of four persons. After discharging Breiter, of course, that was the exact total number of persons left available to perform the 2000 busy-season work.

To be sure, Janousek was not ordinarily available one day each week. Even so, he was a more versatile worker than Breiter, being about to perform electrical forklift work and, also, painting. There is no evidence showing that Respondent had anticipated, as of March 29, any

increase in work during the 2000 busy season exceeding that of previous years. In fact, so far as the record reveals, Respondent was able to complete that work without having to resort to new hires or subcontractors.

Furthermore, there is no basis for inferring that there had been some sort of increase in overtime to accomplish that work. There is no direct evidence of any increase in the amount of overtime worked after March 29. On brief it is asserted that Jay Seurer and Rhorda "are salaried employees; thus no breakdown as to overtime hours are shown" for them by Respondent's records. But, no evidence was adduced about the method of payment for Jay Seurer and Rhorda. Seemingly such evidence was available for production during the hearing. It would be improper to allow it to be added to the record after the hearing had closed. See, e.g., *Transit Management of Southeast Louisiana, Inc.*, 331 NLRB No. 30, slip op. at fn. 2 (May 25, 2000).

Payroll summaries for January through June were introduced for Breiter and Janousek (Breiter's, of course, ending on March 29). The one for Breiter shows that from January through March 29, he had worked a total of 549.03 regular hours and 50.37 overtime hours, approximately one hour of overtime for every 11 regular hours. The one for Janousek shows that from January through June he had worked a total of 1,004.87 regular hours and 100.03 overtime hours, approximately one hour of overtime for every ten regular hours. To the extent that any comparison can be validly made from summary records, it hardly can be concluded that Janousek had worked any significantly greater amount of overtime after March 29 than he and Breiter had been working prior to that date. To the extent that Janousek did work an hour of overtime for every ten regular hours, as opposed to every 11 hours for Breiter, the most that can be said is that Seurer had been accurate in his March 29 assessment: Respondent's actual work had not been so great during its busy season that it needed to employ a fifth worker to repair and resell mechanical equipment.

A different conclusion is not justified by the evidence that Respondent had five forklifts to repair on March 29. No evidence was adduced to refute Seurer's testimony that three of them were in such bad shape that they could not be repaired and had to be scrapped. Nor is there any evidence contradicting his further testimony that one of the other two took "probably a half day" to repair, while the second "one we put in a couple days" to refurbish. That total of three days hardly serves to show that Respondent had been left short-handed as a result of Breiter's termination. To be sure, Breiter was not able to provide any contradicting evidence, since he was no longer employed at the Savage facility after March 29. But, surely Rhorda and Janousek could have refuted Seurer's testimony about those five forklifts, had that been possible. "The burden of establishing every element of a violation under the Act is on the General Counsel." *Western Tug and Barge Company*, 207 NLRB 163 fn. 1 (1973).

I conclude that a preponderance of the credible evidence fails to establish that James Breiter had been discharged because of any statutorily-protected activity in which he had engaged. Instead, a preponderance of the credible evidence establishes that he was discharged, as James Seurer testified, for an accumulation of things over time, culminating with the incidents on March 29, when Janousek seemed to be saying that he would quit if Respondent did not correct the situation with Breiter and when a trailer was damaged in a manner that could have been prevented, had Breiter followed directions to ensure against that damage. At that point, Seurer assessed his personnel needs in light of business prospects and decided that Respondent could get along without Breiter.

Conclusions of Law

Forklift & Equipment Service, Inc., an employer engaged in commerce, has not violated the Act by discharging James Breiter on March 29, 2000, nor in any other manner.

Upon the foregoing findings of fact and conclusions of law, and based upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[3]

ORDER

IT IS HEREBY ORDERED that the Complaint be, and it hereby is, dismissed in its entirety.

Dated: Washington, D.C., this 26th day of March, 2001.

WILLIAM J. PANNIER III
Administrative Law Judge

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.